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Valorizing the Subjunctive: The Unfortunate Judicial Contribution of R. v. Carosella

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CASE COMMENT

VALORIZING THE SUBJUNCTIVE: THE UNFORTUNATE JUDICIAL CONTRIBUTION OF *R.* v. *CAROSELLA*

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Nick Carosella owes his freedom from conviction on gross indecency charges not to a single judge or jury, but to two entities whom he has never met. These two—the Supreme Court of Canada and the Windsor Sexual Assault Crisis Centre—have transformed a handful of written notes into an ambiguous extension of the concept of relevance. The latter organization, by destroying the complainant's counselling records, forced the former to revisit, via the *Charter*,[1] the relevance of such records. At the end of the day, the fates of Carosella and his alleged victim seem almost incidental to the Court's latest instalment in an ongoing foundational confrontation over whether, and if so, the way in which, the rules of evidence might need to be customized in cases of sexual assault.

In the recently-released decision *R.* v. *Carosella*,[2] Sopinka J. (in the majority) and L'Heureux-Dubé J. (in the minority) continue to illustrate the stark conceptual and doctrinal gulf which separates those Justices who see no need for the law to recognize or adapt to social

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1 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter the Charter].

2 *R.* v. *Carosella*, [1997] 1 S.C.R. 80 [hereinafter *Carosella*].

inequities beyond the ambit of the courtroom "contest," and those who do.[3] The division in the court on the issue of production of records by third parties in cases of alleged sexual assault was demonstrated in late 1995 in two cases: *R.* v. *O'Connor*[4] and *R.* v. *Beharriell*.[5] In the several years since the cases arose, it has become commonplace for accused persons to seek production of such records. The results of such applications have been inconsistent.

In response to the risk of possible disclosure of counselling records, a number of sexual assault crisis counselling centres developed strategies to defend the privacy of their clients. Such strategies typically consisted of either not keeping records or destroying them. In *Carosella* it was the latter, thereby causing Sopinka and L'Heureux-Dubé JJ. to grapple with, amongst others, three main points:

(i) the effect of unavailability;

(ii) the consequent inability to apply the *O'Connor* test for production; and

(iii) the *Charter* implications of such a situation for the accused.

In the course of their respective reasons, both justices make significant statements either extending or confirming their previous positions on the relevance of such records. In contrast to the consistency of L'Heureux-Dubé J., Sopinka J. makes significant alterations to his earlier treatment of relevance. The rift in the Court seems to widen in *Carosella*, as the undertone of thinly-veiled anger threatens to explode. How much of this is due to mutual frustration at the further entrenchment of positions, and how much due to the tangential relation of the

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3 D. L. Martin, "Rising Expectations: Slippery Slope or New Horizon? The Constitutionalization of Criminal Trials in Canada" in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 87 at 113, has characterized the tension in the current Court as between "traditional visions of the role of the criminal law (resolving issues between an accused and the state) against those of others who advocate more transformative goals for the system (such as the amelioration of historical inequities in the lives of women and children)." Replicated in *Carosella* as well in the voting pattern: Sopinka J. carries the case by a bare but familiar majority; L'Heureux-Dubé J. is joined in dissent by her three occasional but familiar dissentients on these and related issues. Martin's point is interesting to note given the context of L'Heureux-Dubé J.'s opening words in Carosella:

> The criminal justice system, being very much a human enterprise, possesses both the strengths and frailties of humanity. Lacking a flawless method for uncovering the truth, or a crystal ball which can magically recreate events, the court attempts to determine an accused's guilt or innocence based on the evidence before it. This search for justice does not operate perfectly, and in every trial there is likely to be some evidence bearing upon the case which does not appear before the trier of fact. Still, society expects courts of law to ascertain that person's guilt or innocence by way of a trial, and, subject to the uncertainties inherent in any human enterprise, to render a verdict that is true and just. (Carosella, *supra* note 2 at 114)

4 *R.* v. *O'Connor*, [1995] 4 S.C.R. 411 [hereinafter *O'Connor*].

5 *A.(L.L.)* v. *B.(A.)*, [1995] 4 S.C.R. 536, (*sub nom. R.* v. *Beharriell*) [hereinafter *Beharriell*].

case to the main issue of the proper approach to evidence in sexual assault cases is difficult to tell.

Moreover, there are at least two factors which make the case unfortunate both in its timing and in its effect. First, rather than an allegation of sexual assault, the case involved a three-decade-old allegation of sexual touching, thereby invoking the hotly-debated possibility of "recovered memories," albeit without direct mention of it. Second, the understandable but provocative action of the rape crisis centre in destroying records has the not-unexpected effect of enraging that element of the court which reveres the "rule of law" and sees the courts, not independent third parties, as the ultimate, neutral arbiters of what information will or will not be adjudged relevant and made available to the accused.

The focus of this paper is to assess the impact of *Carosella* on the debate regarding relevance of third-party counselling records, and to examine the case critically to determine if it is possible to extract any consistent principle from it which can be applied to other forms of third party record-keeping. The paper is divided into three parts. In the first part is the background against which the decision in *Carosella* must be viewed, as it pertains to the uneasy conjuncture of two essentially separate strands of thought about relevance originating from the *O'Connor* case. In the second part the relevant facts and trial history of the *Carosella* case are summarized. The third part is a critical analysis of certain aspects of the reasoning employed in *Carosella* on relevance, with reference to the critical literature which has grown up around the topic of access to third party counselling records. In a brief conclusion, the significance of the minority's observations on the nature of third-party counselling records is reviewed. A suggestion is also made for an augmented first stage of the *O'Connor* test for production. This might then address certain of the issues left unsolved by *Carosella*.[6] Finally, the paper will consider whether even such a partial resolution will be forthcoming in the near future.

I. THE *O'CONNOR* TEST FOR DISCLOSURE OF THIRD PARTY COUNSELLING RECORDS

The subject matter of *Carosella* must be analyzed in terms of working definitions of third-party records and relevance, and against the background of the standards set by the test in the *O'Connor* case.

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6 This suggestion is a variant of that proposed by Marilyn T. MacCrimmon in her recent essay "Trial by Ordeal" (1996) 1 Can. Crim. L.R. 31 at 50 [hereinafter "Trial by Ordeal"]. Although written prior to the Supreme Court decision in *Carosella*, the unhelpful nature of *Carosella* makes such emendation all the more necessary.

A. Working Definitions: Relevance of Third Party Records

Carosella involved notes made by a non-professional rape crisis counsellor in an advice session with the alleged victim of sexual abuse. In criminal matters, courts have classified these third party records differently in evidential terms from records held by the Crown. Third-party records have been defined by L'Heureux-Dubé J. in *Beharriell* as:

> any record, in the hands of a third party, in which a reasonable expectation of privacy lies. These records may include medical or therapeutic records, school records, private diaries, social worker activity logs and so on.[7]

Both common law and the *Charter* guarantee that an accused will have the right to make full answer and defence to the charges against him.[8] Counsel for the accused is expected to conduct a full and vigorous defence. Sexual assault is rarely committed in front of witnesses, and so may all too easily devolve into a credibility contest. *R.* v. *Stinchcombe*[9] established that the Crown must make full and complete disclosure of all information in its possession, exculpatory as well as inculpatory. Nonetheless, the combination of changes made to the Criminal Code under Bill C-49[10] via the Supreme Court's holding in *R.* v. *Seaboyer*[11] have stripped defence counsel of certain "traditional" avenues of attack upon the credibility of the complainant.

Of course, these avenues find their basis in a number of deeply-embedded cultural myths and stereotypes concerning women who complain of sexual assault.[12] The history of law's contribution to this is a long and sad one. Women are typically characterized, in the eyes of the law, as either possible rape victims or not. Similarly, the legal system permits certain assumptions about the male rapist to flourish. Certain injuries are required before a woman's complaint becomes plausible and worth pursuing within the justice system. None of this is necessarily expressly written into legislation, but arises through various myths that insinuate themselves throughout the levels of our legal system:

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7 *Beharriell, supra* note 5 at 558-59.

8 *Charter*, ss. 7, 8, and 11. The gendered description will be used throughout this paper, given the overwhelming preponderance of male accuseds and female complainants in sexual assault cases.

9 *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326 [hereinafter *Stinchcombe*].

10 *An Act to Amend the Criminal Code (Sexual Assault)*, S.C. 1992, c. 38, s. 2, amending the *Criminal Code*, R.S.C. 1985, c. C-46, s. 276.

11 *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 [hereinafter *Seaboyer*].

12 The remainder of this paragraph is based on the excellent exploration of the issue in L'Heureux-Dubé J.'s dissent in *Seaboyer, ibid.* which begins at 643. A number of works are referred to in the dissent, but for reasons of space, are omitted here. Readers are urged to refer to these sources for a more detailed analysis.

(i) women are always able to prevent rapes if they *really* wish to;

(ii) rape does not occur between friends or relatives, but is a crime committed by strangers;

(iii) women are caricatures, either good or bad. The bad, which is a widely drawn category including those typically marginalized, will always consent to sex;

(iv) a woman's emotional nature means that true rape victims show predictable responses immediately after rape; and

(v) women are, by nature, vengeful and conniving.

While there are those who have taken issue with these stereotypes, it is reasonable to assume that some of them, if not all, at the very least work at a subconscious level—probably in the minds of both men and women. Making records of the circumstances surrounding an event of sexual assault may be helpful to the victim, but can also perpetuate these very myths and stereotypes, especially (iv) and (v). Moreover either the presence or absence of records at trial can be immaterial and can play into defence tactics by allowing lawyers in either case to capitalize on contradictory expectations regarding the reporting of sexual assault—a "proper" degree of shame should produce reticence to report, but equally "proper" anger requires a response.[13]

The type of records listed by L'Heureux-Dubé J. in *Beharriell*, in so far as they relate to sexual assault cases, at least purport to contain information about either the victim, the perpetrator, or the event on which a charge is based.[14] It follows naturally, then, that defence counsel would generally wish to have access to these records. However, as such

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13 These "dilemmas" have a long history. Sixteenth and seventeenth century European witchcraft trials are a notable example. Friedrich von Spee reported the following:

> [T]o avoid the appearance that she [the accused "witch"] is indicted solely on the basis of rumor, without other proofs, a certain presumption of guilt is obtained by posing the following dilemma: Either she has led an evil and improper life, or she has led a good and proper one. If an evil one, then she should be guilty. On the other hand, if she has led a good life, this is just as damning; for witches dissemble and try to appear especially virtuous . . . Therefore the old woman is put in prision. A new proof is found through a second dilemma: she is afraid or not afraid. If she is (hearing of the horrible tortures used against witches), this is sure proof; for her conscience accuses her. If she does not show fear (trusting in her innocence), this too is a proof; for witches characteristically pretend innocence and wear a bold front.

From Cautio Criminalis (Precautions for Prosecutors), 1631. Quoted in C. Sagan, *The Demon Haunted World* (New York: Ballantine, 1996) at 408.

14 The kind of information will vary considerably; this fact will be dealt with in Part III of this paper. Professor Joan Gilmour has observed that requests for access to such records only gained impetus after these previous "old standbys" of myth and stereotype were lost after *Seaboyer*, see J. M. Gilmour, "Counselling Records: Disclosure in Sexual Assault Cases" in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 239 at 266.

records are in the hands of non-parties and not the Crown, and are of course subject to some (variable) expectation of privacy, accessing the records in the first place may be problematic. Unlike files in the possession of the Crown, for which *Stinchcombe* established the presumption of relevance, counselling records remained elusively just outside the ambit of the proceedings.

Relevance lacks a legal definition *per se*, but is instead said to be a judgment made by the trial judge according to "common sense and experience."[15] This quality is discovered, generally, by reference to "logic and general experience."[16] Something is relevant if it tends to make a fact more or less probable. How it "tends" to do so is, of necessity, by way of a linking generalization. These are the bridges between that which is offered and that which it is offered to prove or disprove. A core problem is that a linking generalization is not a "quality" of the thing, fact, or event offered as potential evidence. It is *generated* by human beings in the hope of proving or disproving a matter in issue. Consider the vastly different linking generalizations, after the bombing in Oklahoma City, which might be attempted in relation to a scrap of paper on which is scrawled the set of words, "fuel oil" and "fertilizer." Of central concern in this essay is the nature of the generalizations which might persuade a finder of fact that missing counselling records are relevant.

For the purpose of the analysis which follows, the conceptual categorization of relevance provided by Sopinka J. in *R.* v. *Mohan*[17] is useful for two reasons. First, his subcategories flag many of the topics found in academic critiques related to counselling records and relevance. Second, as Sopinka J. is the author of the majority judgment in *Carosella*, there is a clear connection between the reasoning employed in each case.

In *Mohan*, Sopinka J. identifies relevance as the threshold requirement for the admission of evidence. Forcing a distinction, he unpacks the notion of "logic and general experience" into an assessment of information's logical relevance and its legal relevance.[18] In assessing logical relevance, the question to be asked is whether the information

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15 In R. J. Delisle, *Evidence: Principles and Problems*, 4th ed. (Toronto: Carswell, 1996) at 13.

16 Professor J. B. Thayer, quoted in Delisle, *ibid.* at 13.

17 *R.* v. *Mohan* (1994), 114 D.L.R. (4th) 419 (S.C.C.) [hereinafter *Mohan*]. Although *Mohan* dealt with the admissibility of expert evidence, Sopinka J.'s comments regarding the nature of relevance can generally be applied.

18 In fact, Sopinka J. suggests the considerations involved here might better be viewed as a general exclusionary rule. However, he asserts that "whether it is treated as an aspect of [legal] relevance or an exclusionary rule, the effect is the same" (*Mohan, ibid.* at 427). In general, he advances admissibility considerations to the relevance assessment stage.

makes a matter or fact in issue more or less likely, based on an identifiable generalization. In assessing the legal relevance, probative value in terms of necessity and reliability are to be weighed against possible prejudicial effects to determine whether a negative effect is out of proportion to the reliability of the evidence. Although Sopinka J. derived this particular description of assessing relevance to deal with expert evidence, it incorporates steps which will occur at some point in the process in considering the relevance of any piece of information. Cory J., in *R.* v. *Osolin*,[19] similarly advanced the admissibility criterion of probative value versus prejudicial effect so that the test became virtually synonymous with the threshold test of relevance assessment.

When, how, by whom, and in what manner this initial assessment for relevance would be performed in the case of a request for production of third-party counselling records not in the possession of the Crown, and hence not available for disclosure under *Stinchcombe*, was codified by a majority of the Supreme Court of Canada in *O'Connor*. In that case and *Beharriell* (reasons released at the same time) it became clear that a majority of the Court, while acknowledging the importance of the privacy interest of the complainant in such records, would only allow this interest to inform the *structure* of the test, not *whether* it would be performed. Despite reference in *Beharriell* to Lamer C.J.'s statement in *C.B.C.* v. *Dagenais*[20] that there is no hierarchy of *Charter* rights, a pragmatic reading of both cases makes it plain that the *Charter*-enhanced right of the accused to make full answer and defence effectively trumps privacy.[21] *Beharriell* ensures that any claim of privilege in such records will also never prevent application of the procedure as set out in *O'Connor*.

B. The *O'Connor* Test

The process set out in *O'Connor* by which the defence may gain access to third party records—after a subpoena is issued, notice to record-holder and complainant is given, and a request for an order to produce is made at trial—involves two stages:

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19 [1993] 4 S.C.R. 595 [hereinafter *Osolin*].

20 [1994] 3 S.C.R. 835 [hereinafter *Dagenais*].

21 This is also the implication behind the majority's decision in *M.(A.)* v. *Ryan*, [1997] 1 S.C.R. 157 (L'Heureux-Dubé J.'s dissent focuses on the need for *Charter* rights to privacy, in the context of sexual assault cases, to be considered). Interestingly, a hierarchical view of rights would seem to be supported by the fact that national security, for example, trumps the right to full answer and defence (at least in the non-criminal context of removal hearings under the *Immigration Act*)—see *Canada (Min. of Employment and Immigration)* v. *Chiarelli*, [1992] 1 S.C.R. 711; *Yamani* v. *Canada (Solicitor General)* (1995), 32 C.R.R. (2d) 295 (Fed. Ct. T.D.); *Albani* v. *R.* (1995), 32 C.R.R. (2d) 95 (Fed. Ct. T.D.).

> Stage One—The accused must bring a formal written application supported by an affidavit setting out the specific grounds for production. The onus is on the accused to satisfy the judge that the information is "likely to be relevant." The judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial. If so, the records must be produced to the judge for examination.[22]
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> Stage Two—Once the records are produced to the court, the judge should examine them to determine whether, or to what extent, the records should be produced to the accused. At this stage—and this stage only—the judge should consider the salutary and deleterious effects of production, and weigh the privacy interest of the complainant and the right of the accused to make full answer and defence. According to the majority, in balancing these interests, the judge should be guided by five factors: necessity, probative value, the privacy interest involved, whether production would be premised on any discriminatory belief or bias, and possible prejudice to the complainant.[23]

Depending on the result of the above, all, some, or none of the requested records will be produced to the accused. It is important to note that although this procedure was developed in the specific context of counselling records and sexual assault trials, the generality of the language employed presumably makes it applicable to all situations in which third party records involve a privacy interest.

C. Content of the "Likely Relevance" Standard: Stage One

The majority[24] in *O'Connor*, having confined the stage one test to a bare "likely relevance" threshold, develops the content of this test in some detail: "the onus . . . should not be interpreted as an evidential burden requiring evidence and a *voir dire* in every case;" production cases require a "higher threshold" than in the disclosure context; it is "a significant burden" but which "should not be interpreted as an onerous burden" and should be "a low one."[25] In general, the relevance threshold "is simply a requirement to prevent the defence from engaging in 'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming' requests for production."[26] The rationale for pitching the

22 *O'Connor*, *supra* note 4 at 434-41.

23 *Ibid.* at 441-43.

24 This part concentrates only on setting out the bare bones of the *O'Connor* procedure as it stands as the majority decision of the Supreme Court and therefore the law in Canada. Pertinent aspects of the critique offered by the dissenting opinion of L'Heureux-Dubé J. will be incorporated, where appropriate, in Part III.

25 *O'Connor*, *supra* note 4 at 435-37.

26 *O'Connor*, *ibid.* at 438, quoting from *R.* v. *Chaplin*, [1995] 1 S.C.R. 727.

first relevance threshold so low is that the defence is hindered by "not knowing precisely what is in the records."[27]

In response to several criticisms of this low threshold[28] by L'Heureux-Dubé J., the majority go on to illustrate "likely relevance" and materiality by reference to cases in which there may be "a close temporal connection between the creation of the records and the decision to bring charges;" where the information might concern "the unfolding of events underlying the . . . complaint;" the "use of a therapy which influenced the complainant's memory;" and information that bears on credibility.[29]

In essence, the initial stage inquires only into the logical relevance, while legal relevance, and particularly probative value versus prejudice, are only considered in the second stage, after production to the judge alone. It is clear from the above that the majority views the first stage of the production analysis as different in kind and effect from production to the defence.

L'Heureux-Dubé J., in dissent, contends that assuming relevance for therapeutic records in sexual assault cases is "highly questionable" and that such information as they do contain is either not relevant or only attenuatedly so.[30] In an attempt to refute this criticism, the majority cites:

> the reality that in many criminal cases, trial judges have ordered the production of third party records. . . . The sheer number of decisions in which such evidence has been produced supports the potential relevance of therapeutic records.[31]

In *Beharriell*, Lamer C.J. and Sopinka J. confirmed the "procedure and substantive law to be followed," which they had set out in *O'Connor*, and invited the unsuccessful respondent to renew his request for production of records in line with those procedures. L'Heureux-Dubé J., again in dissent, provided an exhaustive analysis of the unsuitability of the use of class privilege (and, less certainly, case-by-case privilege)[32] to attempt

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27 *Ibid.*

28 And the segregation of all other factors to the second stage.

29 *O'Connor*, *supra* note 4 at 439-41.

30 *Ibid.* at 481 and 498.

31 *Ibid.* at 440. Sopinka J.'s willingness to supply hypothetical ways in which information contained in therapeutic records might be relevant, discloses something dangerously close to a "linking generalization" in favour of the relevance of records not-yet-seen. Similarly, the use of a mere statistical answer to doubts expressed about the likelihood of relevance of a category of information, as here, would seem to pre-supply the answer to the onus on the accused. See, generally, MacCrimmon, "Trial by Ordeal," *supra* note 6.

32 L'Heureux-Dubé J. neatly summarizes the distinction between class and case-by-case privilege

to block production of counselling records.[33] Easily overlooked is her suggestion that after the receipt of the subpoena, and prior to the first stage of the *O'Connor* application, "[i]t may be useful . . . for the third party to prepare a list of the records in its possession."[34]

It was within this legal framework, and in an environment in which applications for therapeutic records had become *pro forma* defence manoeuvres in sexual assault cases,[35] that rape counselling centres felt forced to consider some form of self-help to protect the privacy interests of their clients.[36] It was therefore only a matter of time before a case like *Carosella* arose.

II. JUDICIAL HISTORY OF *R.* v. *CAROSELLA*

Nick Carosella, a teacher, was charged in 1993 with gross indecency for allegedly having sexual contact with the complainant between 1964 and 1966, when she was a grade 7 and 8 student. A year prior to the charge being laid, the complainant had sought advice from a counsellor at the Windsor Sexual Assault Crisis Centre ("the Centre") about how to lay charges for the alleged sexual abuse decades earlier. She was interviewed for an hour and a half to two hours by a social worker, who took notes,

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in *Beharriell*: class privilege is a prima facie presumption that communications are inadmissible based on the category of relationship; for example, husband and wife, or solicitor and client. In case-by-case privilege, as the name implies, admissibility is decided in a particular case by reference to the four-step Wigmore criteria: *Beharriell, supra* note 5 at 562-63, see also *R.* v. *Gruenke*, [1991] 3 S.C.R. 263 at 286.

33 In doing so, L'Heureux-Dubé J. lays to rest any further attempt to move in the direction (only sporadically successful) of U.S. counselling centres' attempts to invoke either common-law, or, increasingly, qualified statutory privilege. For comprehensive treatment of such struggles by U.S. writers, see for example: M. B. Hogan, "The Constitutionality of an Absolute Privilege for Rape Crisis Counselling: A Criminal Defendant's Sixth Amendment Rights Versus a Rape Victim's Right to Confidential Therapeutic Counselling" (1989) 30 Bos. Coll. L. Rev. 411; A. Y. Joo, "Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor" (1995) 32 Harv. J. Legis. 255; M. Laurence, "Rape Victim-Crisis Counselor Communications: An Argument for an Absolute Privilege" (1984) 17 U.C. Davis L. Rev. 1213; M. H. Neuhauser, "The Privilege of Confidentiality and Rape Crisis Counselors" (1985) 8 Women's Rts. L. Rep. 185; K. E. Williamson, "Confidentiality of Sexual Assault Victim-Counselor Communications: A Proposed Model Statute" (1984) 26 Ariz. L. Rev. 461; and C. J. Scarmeas, "Rape Victim-Rape Crisis Counselor Communications: A New Testimonial Privilege" (1982) 86 Dick. L. Rev. 539. See also *Beharriell, supra* note 5 at 558-81.

34 *Beharriell, supra* note 5 at 585. Although inconsequential in the current situation, this could be useful in the amended version of the first stage relevance test suggested in the conclusion, where information concerning the type of record kept, if adequately described, may be important. See *Conclusion*, below.

35 This defence tactic became even more widespread after *O'Connor*. A cursory search of the Quicklaw "Canadian Judgements" database in February 1997 indicated hundreds of cases, across the country, in which applications based on the *O'Connor* formulation seemed to have been made.

36 As had been done by similar centres in the U.S. since the late 1970s; see authors cited *supra* note 33.

and who advised the complainant that whatever she said could be subpoenaed to court. The complainant accepted that. She went home from the interview and immediately contacted police.

During the preliminary inquiry, counsel for the accused brought an unopposed application for production of the Centre's files. The file produced to the trial judge did not contain interview notes. A subsequent *voir dire* revealed, through evidence of the Centre's executive director, that the notes from the complainant's file had been among hundreds shredded in April 1994. As a result of many previous failures in opposing production, the Centre had adopted a two-pronged policy:

(i) notes were to be taken in a way which made them useless if produced, concentrating on feelings rather than events, avoiding direct statements, truncation and other devices; and

(ii) notes taken in matters with "police involvement" were to be shredded prior to their being subpoenaed.[37]

The social worker who had shredded the roughly ten pages of notes had no recollection of their contents. The Crown then submitted, in lieu of the missing notes, a collection of transcripts and affidavits. These formed the factual basis for the accused's application for a stay based on an inability to make full answer and defence. The matter was decided in favour of the accused at trial, but was reversed at the Ontario Court of Appeal.

A. The Decision at First Instance

Ouellette J., while holding a) that the onus was on the accused to show that destruction of the notes "create[d] a prejudice to the accused of such magnitude and importance that it can fairly be said to amount to a deprivation of the opportunity to make full answer and defence,"[38] and b) that the court should not speculate as to the contents of the notes, nevertheless concluded:

> that there is no speculation in coming to the conclusion that the notes of those interviews . . . relate to alleged sexual incidents in this trial and, therefore, *are relevant and material and would more likely than not tend to assist the accused.*[39]

The judge granted a stay, since the accused had been deprived of the opportunity to introduce inconsistencies in the complainant's evidence

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37 See *Carosella, supra* note 2 at 92.

38 *R.* v. *Carosella* (1994), 35 C.R. (4th) 301 (Ont. Ct. (Gen. Div.)) at 305.

39 *Ibid.* at 306 [emphasis added].

"that might be sufficient to cause the jury to question the reliability of the complainant."[40]

B. The First Appeal

On appeal to the Ontario Court of Appeal, the panel of Catzman, Osborne, and Abella JJ.A. found that the judge had made a "leap of logic" regarding how and on what basis missing records might prejudice the accused's *Charter* right to make full answer and defence. The appellate panel held that the possibility of the notes being of assistance to the defence was "obscure," in that:

> [t]he missing notes were not a verified account of what the complainant said. The notes did not constitute a written statement of the complainant, who never read, reviewed or signed them.[41]

Further, the panel held that the probable effect of the lost notes should have been judged in light of the amount of other material available to the defence, which included the investigating police officer's notes, the complainant's statement to police, written statements of three Crown witnesses and the complainant's preliminary inquiry evidence.

C. The Supreme Court

The appeal proceeded to the Supreme Court, where a bare majority overturned the appeal judgment and reinstated the stay granted at first instance. Details of the reasoning will appear, where appropriate, in the analysis which follows in Part III. Although not directly pertinent to the narrow focus of this essay, it is interesting to note that the majority reasons are replete with arguable contentions, each worthy of further analysis. These include:

(i) Sopinka J., for the majority, grounds the breach of the accused's right to make full answer and defence on the premises that: first, the right to production from third parties is as constitutionally-based as the right to production from the Crown (para. 26); and second, it would be fundamentally unfair to require the accused to show that the missing notes—which the defence could not see—prejudiced the conduct of his defence. Analogizing with the wiretap case of *R.* v. *Farinacci*[42] and the Cabinet documents case of *Carey* v. *Ontario*,[43] Sopinka J. asserts

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40 *Ibid.* at 97.

41 *R.* v. *Carosella* (1995), 26 O.R. (3d) 209 (C.A.) at 214.

42 [1994] 1 S.C.R. 469 [hereinafter *Farinacci*].

43 [1986] 2 S.C.R. 637.

that it is the very unavailability of the notes which places the accused in an untenable position.[44]

(ii) Sopinka J. held that the fact that the complainant consented to the production of the counselling records "met the threshold test for disclosure or production."[45] He observes that the complainant's consent was required, not the Centre's, that the right to confidentiality "resides in the complainants" and that the destruction of the records without consent of the complainant violates that right to confidentiality.[46]

(iii) This case is to be distinguished from "lost evidence cases generally" because the Centre made a decision "to obstruct the course of justice" and thereby usurped the role of the court in deciding which evidence is to be produced or admitted.[47]

Each of the above three claims would seem to represent significant reinterpretations, revisions, or misstatements of the law. The first, if true, would seem to make the entire *O'Connor* exercise rather futile. The second evinces a rather skewed logic, which would require further elaboration. The third seems to either present a shaky foundation for the extreme remedy of a stay, or to place undue emphasis on imputed motives of non-parties. The presence of such claims in the judgment cannot help but exert some pressure on the credibility of the main holding in the case. It is an examination of that to which we now turn.

III. ANALYSIS OF THE REASONING IN *CAROSELLA*

In this section two questions are asked. First, how satisfying is the majority judgment in *Carosella* as an exercise in exploring the meaning of the standard set in *O'Connor*, generally, for production of third party records? Second, what kind of guidance does it provide for future cases—not only in the area of sexual assault allegations, but also for production of third party records generally?

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44 It must be noted that in both cases cited by Sopinka J., the material not disclosed was *central* to the issue; in fact, the portion of *Farinacci* quoted includes the observation by Doherty J.A. that what has not been disclosed is the "very material which is crucial to demonstrating either prejudice or fraud" (*supra* note 41 at 102). We query whether the counselling notes are as "central" in *Carosella*.

45 *Carosella*, *supra* note 2 at 107. In so doing, he correctly observes that this was the position taken by the Court of Appeal as well. Absent evidence of any request by the Crown for the documents, Sopinka J. is presumably referring to the complainant's lack of reluctance for the notes to be subpoenaed.

46 *Ibid.* It is difficult to determine what Sopinka J. is saying here, in that he seems to imply that by making the records permanently unavailable, the Centre somehow violated the complainant's confidentiality, rather than—it would seem—enhancing it. It is possible he is confusing or conflating a questionable right of access, or some form of property right, with the right of confidentiality.

47 *Ibid.* at 114.

A. Anger Fueling Inconsistency: Sopinka J.'s Valorization of the Subjunctive

1. Flawed Logic

One clear subtext of Sopinka J.'s reasoning is his suspicion of the possibility of "recovered memories." This is evident when, in generating a list of hypothetical ways in which the missing notes may have been useful, he speculates that the notes "could have revealed some statements were the result of suggestions from the interviewer."[48] This must be read in context of the concern over this "type" of therapy, which had prompted Sopinka J. and Lamer C.J. in *O'Connor* to include in their speculative "illustration" of how counselling records may be relevant in sexual assault cases: "they may reveal the use of a therapy which influenced the complainant's memory of the alleged events."[49] It might appear that any allegation of abuse situated a certain distance in the past will invoke—for at least these Justices—such a suspicion. We query whether disclosure of notes, as opposed to questioning of the therapist involved, is the more admissible way of dealing with such a concern. Relevance in this context becomes a little suspect.

The engine driving Sopinka J.'s logic is quite clearly anger at the actions of the Centre, a reaction cautioned against by L'Heureux-Dubé J.[50] Suspicion and anger, working together, cause him to transform an unknown quantity into such a certain one that he feels justified in reconfirming the trial judge's assertion that not only are the missing records both relevant and material, but also that they would more likely than not tend to assist the accused. It is the very quality of "missingness" which seems to fill Sopinka J. with such certainty:

> there was *abundant evidence* before the trial judge to enable him to conclude that there was a reasonable possibility that the information contained in the notes . . . was logically probative to an issue at the trial as to the credibility of the complainant. This information, therefore, would have satisfied the test for disclosure established in *Stinchcombe* but as well the higher test in *O'Connor*.[51]

In effect, Sopinka J. sidesteps entirely the first, "likely relevance," threshold stage of the *O'Connor* procedure, by accepting that the complainant's waiver of confidentiality constitutes fulfilment of the "significant . . . but not onerous burden" proposed by the majority in

48 *Ibid.* at 109.

49 *O'Connor*, *supra* note 4 at 441.

50 *Carosella*, *supra* note 2 at 154.

51 *Ibid.* at 110 [emphasis added].

O'Connor.[52] It is apparently the complainant's waiver which causes Sopinka J. to seemingly conflate the two notions—disclosure by the Crown and production by third parties—and to claim, as if they were virtually synonymous, the satisfaction of both the *Stinchcombe* and the *O'Connor* standard:

> [g]iven the circumstances, it is clear that the file would have been disclosed to the Crown. As material in possession of the Crown, only the *Stinchcombe* standard would have applied. But even if the somewhat higher *O'Connor* standard relating to production from third parties applied, it was met in this case. Once the material satisfied the relevance test of *O'Connor*, the balancing required in the second stage of the test would have *inevitably* resulted in an order to produce.[53]

Given that he offers no reasoned basis in *O'Connor* or elsewhere for the interchangability of the two concepts upon waiver,[54] L'Heureux-Dubé J. is correct to begin her reasons by reminding the majority that the case is not about disclosure.

Although his reasoning should by all rights make it unnecessary to consider how the missing records might have been relevant (in answer to the stage one question of likely relevance), Sopinka J. provides such reasons in abundance:

(i) the notes related to the alleged sexual incidents, and they might have been able to shed light on the "unfolding of events" or contained information bearing on credibility;

(ii) the notes dealt with her initial disclosure, and were the first written record of the allegations;

(iii) the interview lasted one and three-quarter hours, and had the notes contained inconsistencies upon which the complainant could be cross-examined, the notes might have affected the outcome in favour of the accused;

(iv) the accused could have made use of information in the notes, perhaps to cross-examine on inconsistent statements;

(v) though the notes were not statements of the complainant, they could have provided a foundation for cross-examination, in that if they conflicted with other evidence, the witness could be cross-examined

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52 *Ibid.* at 107. See also *O'Connor*, *supra* note 4 at 41.

53 *Ibid.* at 107 [emphasis added].

54 That is, aside from the ethically-questionable but pragmatic suggestion implicit in *O'Connor*—that complainants may "protect" themselves from a violation of privacy by failing to tell the Crown about counselling; thus, with no waiver, there may end up being no disclosure. Whether the opposite is true, that waiver invokes a right to disclosure, thus leaping over the likely relevance threshold, is not certain.

on the inconsistency, and if denied, the statement could be proved by calling the note-taker;

(vi) the notes could have assisted in preparing cross-examination questions;

(vii) the notes may have revealed the state of the complainant's perception and memory;

(viii) the notes could have revealed that some statements were the result of suggestions from the interviewer; and

(ix) the notes might have pointed the defence toward other witnesses.[55]

Unfortunately, in view of the stated intention in *O'Connor* of posing the "likely relevance" threshold as an avowedly "not onerous" obstacle to requests for production by defence counsel which are merely "speculative [and] fanciful,"[56] there would seem to be a very high level of speculation indeed involved in the reasons for relevance he supplies. Having aggregated such a list of reasons for the relevance of the records, Sopinka J. apparently has no trouble persuading himself that they together constitute "abundant evidence" that there was a reasonable possibility the information in the notes was "logically probative . . . as to the credibility of the complainant."[57] The problem with such a statement is, of course, that there was *no evidence at all* before the trial judge, as there was none before Sopinka J. The "evidence" of relevance only exists at the level of speculation, all framed in the subjunctive world of "if," "might," and "could have." The totality of Sopinka J.'s statements regarding "likely relevance" can be reduced to a simple premise: there might have been something in the notes on which to pin an attack on the complainant's credibility. As such, the essence of Sopinka J.'s holding regarding relevance of the records is confined to an elaborate rationalization for the very sort of unsubstantiated fishing expedition the *O'Connor* inquiry was meant to preclude. For Sopinka J., the missing records are *presumptively* relevant, as they were for the trial judge before him. Whatever onus is ostensibly provided by the *O'Connor* procedure's first stage is, for the majority, automatically fulfilled. L'Heureux-Dubé J. at least disagrees, and would require some less speculative showing of how the missing documents may have met the "likely relevance" threshold.

It is difficult to conceive that records held by a Children's Aid Society, or a psychiatrist, or a grief counsellor, in some other context, would elicit such a frenzy of speculation in the majority. This aspect of the majority

55 *Carosella, supra* note 2 at 108-09.

56 *O'Connor, supra* note 4 at 438.

57 *Carosella, supra* note 2 at 110.

judgment would also seem to localize the treatment of third party records in this way to the specific area of sexual assault allegations. Absent such a specific charge, it may be that the "likely relevance" threshold would be more difficult to surmount. Unhappily, no indication that this is so arises from Sopinka J.'s holding in *Carosella*. The seemingly tidy *O'Connor* test, so nicely set out as a sequential algorithm that recognizes vying interests in privacy and disclosure, delivers much less than it promises.

2. UNACCEPTABLE GENERALIZATIONS

The "missingness" of the records is a fact with which the Court is faced, but their absence casts a long shadow, in that the majority finds their likely content to be relevant. The question naturally arises is, how this can be? What generalizations in aid of relevance are used to achieve this curious result?

Bruce Feldthusen, in commenting on *O'Connor*, identifies possible attitudinal bases for such a finding of relevance:

> As a practical matter, whether the onus of proof for production to a judge alone is high or low probably matters relatively little. Far more important is the *de facto* presumption for or against likely relevance that the individual judge, perhaps unknowingly, applies to the question of production. . . . [In *O'Connor*] the minority believes that such information is rarely relevant; the majority simply disagrees. Obviously this crucial background, virtually unchallengeable in any particular trial, will have more impact on the question of production than any debate over the subtleties of legal onus. . . . In the long run, perhaps the greatest contribution of the *O'Connor* decision will be its explicit exposure of the significance of judicial attitudes to legal decision making.[58]

It is quite apparent that Sopinka J. is operating on the assumption that private counselling records are usually relevant; the *in extremis* situation in *Carosella*, in which the records are gone forever, would appear to only strengthen that assumption, since why else would the Centre destroy records?

The possible relation of background judicial attitudes to the disapproved myths and stereotypes enumerated by L'Heureux-Dubé J. in *Seaboyer* is mentioned by Bruce Feldthusen in the course of a restrained observation on the circularity of the majority's reasoning in *O'Connor*.[59]

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58 B. Feldthusen, "Access to the Private Therapeutic Records of Sexual Assault Complainants" (1996) 75 Can. Bar Rev. 537 at 548.

59 *Ibid.* at 549. In response to L'Heureux-Dubé J.'s observation that third party records are unlikely to be relevant, the majority states that the number of judges who have ordered

An examination of the reasons for possible relevance supplied by Sopinka J. indicates that it is very difficult for him to exorcize himself of certain persistent myths and stereotypes. Many of the reasons offered evince an underlying premise that the credibility of women complaining of earlier episodes of sexual assault is inherently questionable; others, that counselling records will almost as a matter of course contain statements on which to challenge the complainant's account; and still others, that a complaint such as that in *Carosella* is a manifestation of "recovered memories," possibly induced by a counsellor. Some generalizations behind certain of Sopinka J.'s reasons for relevance remain unclear—as in the claim of likely relevance because the statements to a counsellor were the only ones not made to the police or at the preliminary inquiry.[60] It is hard not to conclude, as does Sadie Bond in the context of discussing the use of psychiatric history evidence, that it may be the very pervasiveness of the myths which makes credibility the primary issue for Sopinka J. in *Carosella*.[61] Echoing Feldthusen, Bond observes that "[t]he question of relevance is decided based on beliefs rather than truth."[62] She theorizes that entrenched attitudes and beliefs are quite adaptable to changes in law, and that distrust and disbelief of women grounded in myth and stereotype are capable of finding new sites:[63]

> As the introduction of the victim's sexual history is now restricted in Canada by statute, the use of psychiatric history evidence is likely to be seen . . . as an attractive alternative. . . . While the law regarding the admissibility of past sexual history has changed in Canada, the attitudes that resulted in its admission in the past have not. These same attitudes will result in the admission of psychiatric history evidence.[64]

L'Heureux-Dubé J. warned of this in her dissent in *O'Connor*:

> This Court has recognized the pernicious role that past evidentiary rules in both the *Criminal Code* and the common law, now regarded as discriminatory, once played in our legal system. . . . We must be careful not to permit such practices to reappear under the guise of extensive and unwarranted inquiries into the past histories and private lives of complainants of sexual assault. We must not allow the defence to do indirectly what it cannot do

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production, in itself, supports the likely relevance of such records.

60 This might well be a manifestation of an unenumerated but hopefully impermissible stereotype of "conspiring women."

61 S. Bond, "Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance" (1993) Dal. L.J. 416 at 427.

62 *Ibid.* at 439.

63 *Ibid.* at 424.

64 *Ibid.* at 422.

> directly under s. 276 of the *Code*. This would close one discriminatory door only to open another.[65]

In the context of medical record disclosure, L'Heureux-Dubé J. had also warned of this danger earlier in *R.* v. *Osolin*:

> [B]ecause of the beliefs which have typically informed notions of relevance and credibility in sexual assault trials, the mere existence of challenges to credibility on mental or psychiatric grounds in a sexual assault trial raises serious questions about the persistence of rape myths.[66]

This is not to say that Sopinka J. has consciously set out to assess the likely relevance of the missing records on the basis of impermissible stereotypes; rather, that the outrage he feels at third-party self-help has forced him to make a "leap of logic," as did the trial judge below. His generation of a string of hypothetical examples of possible relevance is, as Marilyn MacCrimmon has pointed out, an untrustworthy way to proceed, as resorting to hypotheticals "impl[ies] a set of assumptions about social facts, but do[es] not highlight the necessity of evaluating the truth of these assumptions."[67] Sopinka J.'s leap of logic has been made all the easier by the elusive nature of the "likely relevance" standard set by *O'Connor*.

One further impression left by the majority's reasons is troubling. Despite the holding in *O'Connor* that the threshold of relevance for production of third party records should be higher than in the context of disclosure by the Crown (where relevance is expressed as information that may be useful to the defence),[68] Sopinka J.'s sole focus seems to be on possible usefulness of the records to the defence. He makes no effort to impose any higher standard. While many things may be useful to a defence, such as: age, race, class, and previous sexual history of the complainant; the alleged goal in creating a two-step process in *O'Connor*, and the direction of much of recent jurisprudence in the area of sexual assault, has been to ensure that that usefulness did not remain the sole criterion for disclosure.

In summary, in *Carosella*, the majority seeks to establish relevance by fiat, generating a number of hypothetical reasons for the likely relevance of the missing records which appear to be dangerously close to being based on illegitimate myths and stereotypes. At the same time, Sopinka J. creates out of whole cloth the argument that waiver by the complain-

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65 *O'Connor*, *supra* note 4 at 488.

66 *Osolin*, *supra* note 19 at 624.

67 M. T. MacCrimmon, "Developments in the Law of Evidence: The 1991-1992 Term: Truth, Fairness and Equality" (1993) 4 Sup. Ct. L. Rev. (2d) 225 at 271.

68 *O'Connor*, *supra* note 4 at 436.

ant somehow independently fulfils the likely relevance onus. No serious consideration is given to what the content of the likely relevance standard might be. Sopinka J., and the majority he carries with him, appear willing to make unavailability itself sufficient cause for an automatic finding of logical relevance. For those seeking guidance, the most that can be learned is that if it is not there, it is likely relevant.[69] Viewed in its most positive light, the majority has placed above all other considerations the right of the accused to access any and all information, in whomever's hands, and has indicated the likely remedy when that information is, for some reason, unavailable.[70] Viewed less charitably, the majority has at best provided lessons in the durability of certain entrenched myths, and the apparent inability of the initial *O'Connor* "likely relevance" inquiry to prevent their resurgence.

B. *Carosella* as Guide to Future "Likely Relevance" Inquiries

Both *O'Connor*, in which guidelines for third party records were developed, and *Carosella*, in which these guidelines were applied in the case of missing records, involved allegations of decades-old sexual assault. Both cases involved counselling records originally in the possession of individuals too disparate to forward a claim for privilege.[71] Despite this narrow basis, the guidelines purport to address the wider issue of third party records in which a complainant's privacy interest is involved. It is incumbent on the Court to clarify not just how the guidelines will be interpreted, but also to offer clarification as to how to translate their treatment of the issue of such records beyond the narrow focus of these two cases. This will be difficult, if not impossible, due in part to several peculiarities of the cases, and questions left unanswered.

Two factors limit the usefulness of *Carosella* for understanding how to apply the *O'Connor* test for production of third party counselling

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69 An interesting parallel worth exploring, but outside the scope of this paper, might be with the move in some jurisdictions, such as the U.K. and Australia, towards removing traditional safeguards such as drawing negative inferences from an accused's silence, and allowing evidence of criminal propensity to be admitted. Both take the notion of "relevance" beyond anything contemplated in the past. Thankfully, these safeguards are entrenched in Canada under s. 11 of the *Charter*, and therefore outside the ever-increasing reach of the Supreme Court.

70 Whether this extends beyond cases of sexual assault is highly questionable, given the Court's release of *R.* v. *Wicksted*, [1997] 1 S.C.R. 307 (a missing police notebook did not result in a stay of charges, despite findings of questionable veracity on the part of the officer involved) one week after *Carosella*. A growing body of writing investigates the "special treatment" accorded sexual assault accuseds; of particular interest regarding the gendered nature of the crime, and what flows from it, is the essay by Bond, *supra* note 61.

71 This was the situation in *Carosella* (absent the destruction of the records) and in *O'Connor* at least in part. It forms the essence of L'Heureux-Dubé J.'s rejection of a claim for privilege of such records. See *Beharriell*, *supra* note 5 at 577.

records. The first factor arises from the underlying facts in the case. The central issue in *Carosella* at all levels was the unavailability of the third party records due to their destruction. How the majority's holding on the likely relevance of the missing records will be applied in a case in which the records still exist remains to be seen. The second factor concerns the entrenchment of the division in the court on how to give content to the initial likely relevance inquiry. Writing before the release of the Court's reasons in *O'Connor* and *Beharriell*, Professor Dianne Martin correctly predicted the difficulty awaiting the Court in attempting to achieve consensus on the issue of third party disclosure of counselling records.[72] Despite the Court's apparent agreement on what has become known as the *O'Connor* application procedure, a close reading of *O'Connor* clearly indicates that the majority and the minority envisioned the application of two radically different visions of relevance in the course of the inquiry. This absence of a meeting of the minds around the core evidentiary consideration is made all the more apparent in *Carosella*. Nothing in the majority or minority reasons offers hope for consensus in the near future.

Two questions of particular importance are not only left unanswered by the majority in *Carosella*, but become more of a mystery than ever. The first question involves how to distinguish the difference between the level of relevance needed regarding disclosure and that needed to fulfil the higher standard for production of third party records. L'Heureux-Dubé J. at least attempts to grapple with the question of what should *not* be considered to fulfil the "higher" standard, as she did previously in *Osolin*, *O'Connor*, and *Beharriell*. The second question, its importance heightened by the ready (but unexplored) availability of other methods of attacking the credibility of the complainant in the case, concerns what, if any, arguments for production of third party counselling records could ever fall below the "likely relevance" standard as set by the majority.

The list of possible reasons for likely relevance of counselling records held by third parties given by the majority in *O'Connor*[73] forms the core of the list of probable reasons for likely relevance provided by Sopinka J. in *Carosella*. To this he has added a number of further reasons. There is a real danger, post-*Carosella*, that the tendency to add—or select from—an itemized list will make an order for production virtually automatic.

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72 Martin, *supra* note 3 at 113.

73 Information on the unfolding of events underlying the complaint, use of therapy influencing memory of events, and information concerning credibility (with mention again of memory). See *O'Connor*, *supra* note 4 at 441.

The vigilance advised by Professor Joan Gilmour is seemingly being exercised by only a minority of the Court:

> Courts applying *O'Connor* must be vigilant to ensure that the list the majority compiled and other rationales defence counsel might advance in future cases are not used as devices to give a more sophisticated and hence, superficially more acceptable cloak to the same types of inquiry the Court has already rejected as based on discriminatory or stereotypical reasoning.[74]

Carosella provides no indication that the Court will be more vigilant in future.

Even in the less frequent context of deliberately destroyed records, vigilance will be subject to the whim (or, in Feldthusen's terminology, background judicial attitudes) of individual judges. Gilmour cites another case arising from the Centre's destruction of files in which a stay was not granted, and in which the onus was found not to have been met by the defence.[75] *Carosella* will have a predictable effect on the almost two hundred files of which the Centre also destroyed records. Its precedential effect, if followed at trial or on appeal, will go a long way in pushing the concerns of the minority even further into the background.

IV. CONCLUSION: ATTENDING TO THE NATURE OF COUNSELLING RECORDS

It has become evident in the course of *O'Connor*, *Beharriell*, and *Carosella* that Lamer C.J., Sopinka, Cory, Iacobucci, and Major JJ. are willing to treat sexual assault counselling records in the hands of third parties categorically, as a discrete type of information. The creation of a two-stage procedure with "likely relevance" as nominate threshold must be seen as hovering somewhere between mere lip service and an honest attempt to grapple with the attendant problems of complainants' privacy concerns. It is evident in the two-paragraph invitation to Beharriell to avail himself of the *O'Connor* procedure, that the majority considers the problem well disposed of, and behind them. It remains for L'Heureux-Dubé J., constantly in dissent, to attempt to take a more discerning, pragmatic and functional look at the nature of these records and call the Court's attention to the fact that such records are, for the most part hearsay, inherently unreliable, or not probative as prior statements made by the complainant. In this she is supported by a

74 Gilmour, *supra* note 14 at 268.

75 *Ibid.* at 257-58.

growing chorus of academic writers.[76] Perhaps confident that few such records will be found to fulfil the first stage test, or unwilling herself to fully accept that disclosure to the judge alone is in and of itself a violation of the complainant's privacy interest, L'Heureux-Dubé J. reserves her comments about the nature of such records for her analysis of admissibility at trial, after they have been produced and examined. In *O'Connor*, she describes the substance of such records, echoing her earlier observations in *Osolin*:[77]

> [n]otes of statements made by a complainant in a therapeutic context are inherently unreliable because they are frequently not prepared contemporaneously with the statements, are not intended to be an accurate record of the statements, and are not ratified by the complainant. Moreover, they touch on a variety of topics not relevant to the issues at trial or the complainant's competence to testify.[78]

This theme is elaborated in her reasons in *Beharriell*:

> The questions asked by sexual assault counsellors encompass more than the particular events in issue at trial; they include a wide range of elements such as personal history, thoughts, emotions and other irrelevant information.... Further, private records do not necessarily represent the precise words spoken by the sexual assault complainants.... reliability *or even the relevance* of private records . . . are highly questionable.[79]

In essence, therapy is not reportage. It is not about fact, but about feeling. Self-blame is a well-documented aspect of the trauma associated with sexual assault. Self-recrimination, in the sexual assault therapeutic context, would seem to be as irrelevant, absent specific exceptions, as the previous sexual history of a complainant. It is unfortunate, in light of *Carosella* and what may follow, that L'Heureux-Dubé J. has not addressed her arguments concerning the nature of counselling records to the initial "likely relevance" stage. While this would not have affected the results in any of the cases mentioned, given the intransigence of the majority, it would have begun to lay a base for an attempt to force recognition of therapeutic records as a *class* of document highly unlikely

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76 See for example, Bond, *supra* note 61; Feldthusen, *supra* note 58; Gilmour, *supra* note 14; Martin, *supra* note 3; Marilyn T. MacCrimmon & Christine Boyle, "Equality, Fairness and Relevance: Disclosure of Therapists' Records in Sexual Assault Trials" in Canadian Institute for the Administration of Justice, *Filtering and Analyzing Evidence in an Age of Diversity* (Montreal: Editions Themis, 1995) at 81; and A. Neufeld, "A.(L.L.) v. B.(A.): A Case Comment on the Production of Sexual Assault Counselling Records" (1995) 59 Sask. L. Rev. 335.

77 *Osolin*, *supra* note 19 at 622-23.

78 *O'Connor*, *supra* note 4 at 507-8.

79 *Beharriell*, *supra* note 5 at 572-73 [emphasis added].

to be legally relevant, as suggested by MacCrimmon.[80] In a similar vein, Bruce Feldthusen has recently suggested that the examination of the probative value versus prejudicial effect of such a class of documents might better be located at the initial relevance consideration.[81]

Both suggestions have considerable merit. Unfortunately, privacy arguments have not proven adequate at constructing a high enough initial "likely relevance" threshold, nor have arguments regarding the inhibitory effects of disclosure, even to a judge alone.[82]

Attention to the specific nature of counselling records at an earlier stage in the development of this area of law would have significantly enriched and helped define the content of the "likely relevance" standard set out in *O'Connor*. In our view, an enhanced test, in which the first onus upon the accused would be to argue the relevance of the type of record being requested without reference to the specific case at hand, is a better solution. Such a burden could be "significant but not onerous," but would at least require initial proof that the record was created in such a way that it would guarantee the possibility of being a trustworthy "prior statement of the complainant," or that it was created in a context in which counsellors actually did attempt to help the complainant "recover" memories.

Given the body of knowledge about therapeutic counselling, and the possible willingness of counsellors to share their general record-producing strategy, substantive arguments could be made in something other than an incipient and speculative vacuum. Such an amended test, focusing on the nature of record-taking and the substance of the counselling relationship, and not an individual complainant's records, might be able to impede to a certain degree the return of the seemingly-irrepressible discriminatory myths and stereotypes.

Although forestalling fishing expeditions to the undoubted frustration of the accused, benefits would accrue on a number of fronts. The complainant could be assured that certain types of records are unlikely to be produced. Counselling centres could devise guidelines less crafty than those developed by the Windsor Centre in order to ensure records were safe. The court would have the ability to widen the argument to a more abstract level concerning the nature of the specific type of records in third-party hands, without having to theorize and decide blind—with as little information as the accused—regarding "likely relevance" of individual records.

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80 MacCrimmon, "Trial by Ordeal," *supra* note 6 at 50.

81 Feldthusen, *supra* note 58 at 558-59.

82 One of the prime reasons disclosure is inhibitory is it may well make a victim reluctant to seek counselling after an assault.

Unfortunately, such a revision is not foreseeable. In an almost classic illustration of the adage "hard cases make bad law," no one but Nick Carosella gained from the recent decision in *Carosella.* The Crown has been put in the awkward position that, once having decided to prosecute their case, it may be thwarted by unknowable prior actions of independent third parties. The Supreme Court of Canada has once again replicated its seemingly irreparable division on matters of evidence pertaining to sexual assault, and has done little to attest to its rejection of certain harmful myths and stereotypes. The *Charter* has once again been shown to be an instrument of some ambiguity and little utility in attending to the rights of sexual assault victims. Women who have been sexually assaulted may now be faced with the additional painful decision of whether to seek counselling in order to deal with the effect of the assault, or forego counselling in order to increase the chance that their assailant will be tried on the merits. Finally, relevance, a crucial and necessarily unbounded concept of the law of evidence has not been clarified—and may have been muddied further.